December 2006

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

G. "Commission of Any Other Felony"

4. The Sequence or Timing of the "Other Felony"

Insert the following text immediately before subsection (H) on page 64:

MCL 750.520b(1)(c) requires only that the sexual penetration occur "under circumstances involving the commission of any other felony"; the statutory language "does not necessarily demand that the sex act occur *during* the commission of the felony" but the statute "does require a direct interrelationship between the felony and the sexual penetration." *People v Waltonen*, ___ Mich App ___, ___ (2006) [emphasis added]. In *Waltonen*, the defendant claimed that he supplied the complainant with Oxycontin, a schedule 2 controlled substance, and in exchange, the complainant engaged in consensual sex with him. The defendant argued that MCL 750.520b(1)(c) did not apply because the delivery of Oxycontin did not occur during the sex act. Citing with approval *People v Jones*, 144 Mich App 1 (1985), the *Waltonen* Court noted:

> "Here, the delivery of controlled substances technically occurred after the sexual acts; however, the sexual acts were directly interrelated to the delivery of the drugs as the only reason the victim engaged in sexual penetration was to acquire the drugs. Stated somewhat differently, delivery of the drugs was part and parcel of the act of sexual penetration. Before and during the sexual penetration, the victim and defendant were operating under the knowledge and expectation that drugs would be delivered to the victim after the sexual act and only because of the sexual act. There existed a continuum of interrelated events." *Waltonen, supra* at ___.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Replace the April 2005 update to page 364 with the following:

**People v Walker*, 265 Mich App 530 (2005).

In light of *Davis v Washington*, 547 US ___ (2006), and *Crawford v Washington*, 541 US 36 (2005), the Court of Appeals reversed an earlier ruling* and concluded that a crime victim's statements to a neighbor and a police officer were improperly admitted because they constituted "testimonial statements" for purposes of the Confrontation Clause, and the defendant had not had an opportunity to cross-examine the victim. *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006). In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule.

Because the circumstances in *Walker* were substantially similar to the circumstances in *Davis*, *supra*, and the companion case to *Davis*, *Hammon v Indiana*, the Court concluded that a similar outcome was warranted. As did the United States Supreme Court in *Davis*, the *Walker II* Court determined that the content of the 911 call was nontestimonial evidence properly admitted at trial because the operator's questioning "was directed at eliciting further information to resolve the present emergency and to ensure that the victim, the neighbor, and others potentially at risk . . . would be protected from harm while police assistance was secured." *Walker II*, *supra* at ___.

The *Walker II* Court further concluded that "[u]nlike the 911 call, the victim's written statement recorded by her neighbor, and her statements to the police at the scene, [we]re more akin to the statements in *Hammon*, which the *Davis* Court found inadmissible under the Confrontation Clause." *Walker II*, *supra* at ____. The Court explained:

> "As in *Hammon*, where the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, in this case, the police questioning first occurred in the neighbor's home, and there is no indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed. *Davis, supra* at 2278. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are

> generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely what the officer[s] *should* have done.' *Davis, supra* at 2278. Accordingly, the victim's written statement and her oral statements to the police are inadmissible." *Walker II, supra* at ___.

The Court determined that the error in admitting the testimonial statements was not harmless and remanded the case for further proceedings.